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No. 91-1851

SUPREME COURT, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

BUENAVISTA ESMERALDA CO. LTD.,
a corporation; HIKARI SHOKAI CO., LTD.,
a corporation; MARUICHI TRADING CO., LTD.,
a corporation; AIU INSURANCE COMPANY, a corporation,
Petitioners,
vs.
AEROVIAS NACIONALES DE COLOMBIA, S.A.,
a corporation doing business as
AVIANCA; PAN AMERICAN WORLD AIRWAYS, INC.,
a corporation,
Defendants,
AEROVIAS NACIONALES DE COLOMBIA,
S.A., a corporation doing
business as AVIANCA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the country where the air waybill providing for international transportation of cargo is issued is the "place of business through which the contract has been made" under Article 28(1) of the Warsaw Convention.[1]

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[1]Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929. 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1976).

RULE 29.1 LIST

Aerovias Nacionales de Colombia, S.A. has no parent companies, and the following non-wholly owned subsidiaries:

1. Aerocomercio Internal Ltda.;
2. Corporacion de Viajes Ltda.;
3. Helicopteros Nacionales de Colombia, S.A.;
4. Sociedad Aeronautica de Medellin Consolidada, S.A.;
5. Sociedad Productora y Comerc. de Alimentos Ltda.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Aerovias Nacionales de Colombia, S.A. (hereinafter "Avianca") respectfully requests that the Court deny the petition for writ of certiorari seeking review of the judgment of the Court of Appeals for the Ninth Circuit affirming the District

Court's dismissal of the action pursuant to Article 28(1) of the Warsaw Convention.

The memorandum of the Court of Appeals and the order of the District Court, respectively, are not officially reported. The memorandum and the order are printed in the Appendix to the Petition.[2]

STATEMENT OF THE CASE

1. The Nature of the Case.

Petitioners bring this action for damages arising out of the alleged loss of cargo transported by respondent Avianca and by Japan Air Lines Co., Ltd. (hereinafter "JAL"). On or about September 1, 1986, the consignments, consisting of three small packages of emeralds, were transported from Bogota, Colombia to Tokyo, Japan via Los Angeles, California. The consignments were transported pursuant to air waybills which were issued in Colombia, and which provided for transportation from Bogota to Los Angeles on Avianca, and from Los Angeles to Tokyo on JAL.

Petitioners allege that portions of the consignments were lost during this transportation, and seek damages of $181,625.08.

2. The Course of Proceedings.

Petitioners' action for damages under the Warsaw Convention, and for breach of contract and for breach of bailment, was filed in the United States District Court for the Central District of California on June 30, 1988. On July 21, 1988, Avianca filed a motion to dismiss petitioners' complaint on the grounds that pursuant to Article 28 of the Warsaw Convention,[3] no court in the

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[2]References to the Appendix to the Petition appear as "Pet. A- ".

[3]"An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination." 49 Stat. 3020.

United States has jurisdiction over this action. Petitioners opposed the motion asserting, *inter alia*, that the contract for transportation was formed in the United States, not Colombia, thereby satisfying the requirements for jurisdiction under Article 28. The District Court granted Avianca's motion on September 14, 1988, and on August 13, 1990, entered judgment in its favor on the grounds that the rights and liabilities of the parties are governed by the Warsaw Convention, and that, pursuant to Article 28(1) of the Warsaw Convention, no court in the United States has jurisdiction over this action.

Petitioners timely filed a notice of appeal on August 27, 1990. On December 12, 1991, the Court of Appeals for the Ninth Circuit affirmed the dismissal of the District Court, and entered judgment in favor of respondent. On December 30, 1991, petitioners filed an *untimely* petition for rehearing and suggested that the court rehear the matter en banc. By order dated February 13, 1992, the Court of Appeals denied the petition for rehearing, and rejected the suggestion for rehearing en banc. On May 13, 1992, petitioners *untimely* filed this petition for writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

There are no reasons for the Court to consider this petition for writ of certiorari, and the petition sets forth none. This petition should be denied because it was untimely filed, because the lower courts have uniformly decided the issue consistently with this case, and because it does not involve an important question of federal law which must be settled by the Court.

1. The Petition for Writ of Certiorari is Untimely.

The Court of Appeals for the Ninth Circuit entered judgment in favor of respondent on December 12, 1991. Pet. A-2a. A petition for writ of certiorari seeking review of the December 12, 1991 judgment must have been filed within ninety days thereafter, or by March 11, 1992. 28 U.S.C. § 2101(c)(1992); Sup. Ct. R. 13.1; *Missouri v. Jenkins*, 495 U.S. 33 (1990) ("This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits. Unless the

State's petition was filed within 90 days of the entry of the Court of Appeals' judgment, we must dismiss the petition." *Id.* at 45). The petition for writ of certiorari was not filed until May 13, 1992, and therefore, it was untimely and must be denied.

Although the *timely* filing of a petition for rehearing in the Court of Appeals can toll the ninety day filing requirement of 28 U.S.C. section 2101, such a timely petition was not filed in this case. ("[I]f a petition for rehearing is *timely* filed . . . the time for filing the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment." Sup. Ct. R. 13.4 (emphasis added)). A petition for rehearing must be filed within fourteen days after entry of the judgment, or in this case, by December 26, 1991. Fed. R. App. P. 40(a). Petitioners' petition for rehearing was not filed with the Court of Appeals until December 30, 1991, or four days late. Appendix 1a. Inasmuch as the petition for rehearing was untimely filed, it did not toll the ninety day filing requirement for the instant petition for writ of certiorari. *See* Sup. Ct. R. 13.4.

Despite the untimeliness of the petition for rehearing, the Court of Appeals considered and denied same on February 13, 1992 (Pet. A-1a.), nearly one month prior to the expiration of the ninety day filing requirement of 28 U.S.C. section 2101. Petitioners now have attempted to use the date that the untimely petition for rehearing was denied to extend the date when their petition for writ of certiorari had to be filed. Such a tactic has been rejected by this Court. *Cf. Allegrucci v. United States*, 372 U.S. 954 (1963)(An attempt to recapture timeliness of a petition for writ of certiorari cannot be accomplished by filing an untimely petition for rehearing in the Court of Appeals, even if the Court of Appeals considers the untimely petition for rehearing.)

Petitioners' untimely filing of the petition for rehearing did not toll the filing requirements for the petition for writ of certiorari. For these reasons, this petition for writ of certiorari is untimely and must be denied.

2. There are no Conflicts in the Courts Below.

The decision of the court below is not in conflict with any other federal court decisions regarding the interpretation of the "place of business through which the contract has been made" under Article 28(1) of the Warsaw Convention. Petitioners incorrectly contend that there is a split of authority between the lower courts with respect to this issue. To support this position, petitioners cite, *inter alia*, four Second Circuit opinions, and two District Court opinions from within that circuit,[4] and claim that there are two different analyses with respect to determining where the contract of transportation is made. If this was the case, this would constitute a split of authority wholly within the Second Circuit; a situation which easily could be resolved by that court.

In fact, a review of all decisions regarding jurisdiction under Article 28 reveals that the claimed conflict simply does not exist. As in the case here, when the payment for transportation and the issuance of an air waybill or passenger ticket has taken place in the same country, the courts uniformly have held that that country is the place where the contract is made. *See, e.g., Petrire v. Spantax, S.A.*, 756 F.2d 263 (2d Cir.), *cert. denied*, 474 U.S. 845 (1985) (ticket purchased and issued in Spain; case dismissed); *In re Alleged Food Poisoning Incident, March, 1984*, 770 F.2d 3 (2d Cir. 1985) (ticket purchased and issued in Saudi Arabia; case dismissed); *Gayda v. LOT Polish Airlines*, 702 F.2d 424 (2d Cir. 1983) (situs of the contract in Poland; case dismissed); *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971) (ticket purchased in Canada; case dismissed); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966) (ticket purchased and issued in the United States; case not dismissed); *Lee v. China Airlines, Ltd.*, 669 F. Supp. 979 (C.D. Cal. 1987) (ticket purchased and issued in Hong Kong; case

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[4]*Campbell v. Air Jamaica, Ltd.*, 863 F.2d 1 (2d Cir. 1988); *Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406 (2d Cir. 1982); *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966); *Stanford v. Kuwait Airways Corp.*, 648 F. Supp. 657 (S.D.N.Y. 1986); *Recumar Inc. v. KLM Royal Dutch Airlines*, 608 F. Supp. 795 (S.D.N.Y. 1985).

dismissed); *Boyar v. Korean Air Lines*, 664 F. Supp. 1481 (D.D.C. 1987) (tickets purchased and issued in Hong Kong and Korea; cases dismissed; ticket purchased in the United States; case not dismissed); *Stanford v. Kuwait Airways Corp.*, 648 F. Supp. 657 (S.D.N.Y. 1986) (tickets purchased and issued in Yemen; cases dismissed); *Recumar Inc. v. KLM Royal Dutch Airlines*, 608 F. Supp. 795 (S.D.N.Y. 1985) (air waybills issued in Switzerland and India; case dismissed); *P.T. Airfast Services, Indonesia v. Superior Court*, 139 Cal.App.3d 162, 188 Cal.Rptr. 628 (1983) (transportation contract entered into in Indonesia; case dismissed). *Cf. Campbell v. Air Jamaica, Ltd.*, 863 F.2d 1 (2d Cir. 1988) (case remanded for determination as to where ticket was issued).

There is no split of authority between the lower courts with respect to this issue, and there is no conflict for this Court to resolve. Accordingly, this petition should be denied.

3. This Appeal Does not Involve an Important Question of Federal Law Which Must be Settled by This Court.

A petition for writ of certiorari regarding the application of the jurisdictional requirements of Article 28 of the Warsaw Convention does not involve an important question of federal law which must be resolved by this Court. In fact, this Court already has denied a petition pertaining to the review of this jurisdictional issue. *Petrire v. Spantax, S.A.*, 756 F.2d 263 (2d Cir.), *cert. denied*, 474 U.S. 846 (1985).

This case requires the routine application of the four situs requirements for jurisdiction under Article 28 to very simple facts. The only situs requirement at issue in this case pertains to the determination of where the contract for transportation was made. The Court of Appeals for the Ninth Circuit correctly held that this "has generally been interpreted to mean the place where the air waybill was issued," and affirmed the District Court's dismissal of the action because the subject air waybills were issued, and the transportation was prepaid, in Bogota, Colombia. Pet. A-4a.

Evidenced by the uniformity with which this issue has been decided by the lower courts, this is not an issue which must be

resolved by this Court. Accordingly, this petition should be denied.

CONCLUSION

For these reasons, Aerovias Nacionales de Colombia, S.A. respectfully requests that this Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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APPENDIX A

TO: PANEL AND ALL ACTIVE JUDGES

RE: PETITION FOR REHEARING AND/OR
SUGGESTION FOR REHEARING EN BANC

SHORT TITLE: Buenavista Esmeralda v. Aerovias Nacionales
DOCKET NO.(s): 90-56062

(x) Memorandum ( ) Opinon ( ) Order of
12/12/91 _____
(date)

Panel Judges: Honorable Joseph T. Sneed
Honorable Robert R. Beezer
Honorable Stephen S. Trott

STAMP

Filed December 30, 1991
Cathy A. Gatterson, Clerk
U.S. Court of Appeals